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Recommended Citation

Casen Ross, "A Cuban Claims-Settlement Agreement: The Case from History," Law School International Immersion Program Papers, No. 12 (2015).

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A Cuban Claims-Settlement Agreement: The Case from History

On December 17, 2014, President Obama announced a significant policy shift concerning American-Cuban relations, pivoting toward normalizing relations with the country.¹ Naturally, normalization will require lifting the U.S. trade embargo, but lifting the embargo may not even be legal until outstanding claims held by Americans are resolved against the Cuban government.² During the Castro Revolution, the newly formed Cuban government, expropriated hundreds of American assets, resulting in thousands of claims. In 1964, Congress directed the U.S. Foreign Claims Settlement Commission (FCSC), a division of the Justice Department, to determine the validity and value of these claims. After six years of proceedings, the Commission verified nearly 6,000 claims totaling \$1.7 billion. With interest, these claims are now worth roughly \$7 billion.³ Thus, as relations between these countries continue to thaw, resolving these claims will become an increasingly pressing priority.

¹ See President Barack Obama, Statement by the President on Cuba Policy Changes, <http://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes-0> (last visited Apr. 15, 2015).

² See Jacob Gershman, Obama's Cuba Shift Puts Spotlight on Firms' Asset Claims (Wall Street Journal, Dec. 22, 2014), <http://blogs.wsj.com/law/2014/12/22/obamas-cuba-shift-puts-spotlight-on-firms-asset-claims/> (last visited Apr. 15, 2015).

³ See David Glovin and Toluse Olorunnipa, Cuba Property Claims, Yielding Pennies, May Spur Talks (Bloomberg, Dec. 23, 2014), <http://www.bloomberg.com/news/2014-12-23/cuba-seized-property-claims-seen-as-yielding-pennies-on-dollar.html> (last visited Apr. 15, 2015).

There is a long history of agreements signed with foreign countries to resolve bilateral claims.⁴ In the twentieth century, this tradition includes recognition of the Soviet Union and resolving the hostage crisis in Iran, in addition to many other less high-profile agreements. Agreements with the Soviet Union and Iran were subject to intense constitutional scrutiny—Presidents stretched their Article II powers to the limits, but the Supreme Court has yet to strike one of these agreements.⁵ This paper takes for granted the constitutional basis for signing such an agreement. Rather, the primary inquiry here is one of analogy: using prior agreements as models, what is the possibility or likelihood of a large-scale agreement with Cuba?

This paper finds that any resolution of claims against the Cuban government will turn on political factors, largely controlled by Congress. Past agreements have been concluded swiftly, and relations with Cuba share many features of these past agreements. These past agreements, however, largely involved sole executive action—which can only go so far with Cuba, given statutory restrictions.

The paper proceeds as follows: Part I discusses historical claims-settlement agreements, focusing on the Litvinov Agreement with the Soviet Union and the Algiers Accords with Iran. Part II discusses modern claims-settlement regimes but

⁴ See Evan Todd Bloom, Note, *The Executive Claims Settlement Power: Constitutional Authority and Foreign Affairs Applications*, 85 Colum. L. Rev. 155, 156, 168 (1985) (noting the President had exercised this authority as early as 1793 with Secretary of State Thomas Jefferson and further calling the power “generally uncontroversial”).

⁵ See *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1 (1999). Accordingly, this paper treats as well settled the constitutional basis for signing such an agreement. Rather, the primary inquiry here is one of analogy: How would a Cuban claims-settlement agreement compare with past claims-settlement regimes?

finds little favorable analogical evidence for Cuban negotiations. Part III takes these past examples and attempts to translate them to a prospective agreement with Cuba, injecting first-hand interviews with Cuban officials, academics, and members of the Cuban judiciary.

I. Historical Claims Settlement Agreements

A. Litvinov Agreement

In the early 1930s, the Roosevelt Administration concluded the Litvinov Agreement with the Soviet Union, easing tensions between the two nations dating back to the Bolshevik Revolution.⁶ The parties' ambitions for the Agreement were impressive. Of prime importance, they sought to collect Soviet debts owed to American citizens,⁷ obtain American political recognition of the Soviet state, and release Soviet claims against the United States arising out of American assistance for the White Armies.⁸

The Agreement was one of the first major actions of the Roosevelt Administration and negotiations were begun in October 1933 at its behest—President Roosevelt wrote to Soviet President Mikhail Kalinin suggesting the two

⁶ During World War I, when the United States sent troops to Russia to aid the “White Armies” in efforts to displace the Bolsheviks following the October Revolution.

⁷ For a discussion of the nature of the Soviet debts, totaling over \$336 million (1933 dollars), see Donald G. Bishop, *The Roosevelt-Litvinov Agreements: The American View* 140–78 (Syracuse Univ. Press 1965).

⁸ For a discussion of the Soviet claims, including over \$5 million in bank deposits and \$3 million in claims against American corporations, see *id.* at 179–98. See also John N. Hazard, Book Review, *The Roosevelt-Litvinov Agreements: The American View*, 60 Am. J. Int'l L. 419, 419 (1966) (detailing the diplomatic efforts and further noting that the Agreement sought to construct an American embassy building in the Soviet Union, exchange American dollars for Soviet rubles at “reasonable rates,” and sever the link between the Soviet Government and the American Communist Party).

countries begin “frank friendly conversations” to resolve their differences.⁹

Remarkably, President Roosevelt and Soviet Commissar of Foreign Affairs Maxim Litvinov concluded correspondence just over a month later—they had architected a deal that included significant Soviet concessions, including releasing and assigning to the United States all American judgments (and potential judgments) in favor of the Russian government from American nationals,¹⁰ a Soviet promise to not pursue claims against the United States for damages arising out of American support for the White Armies before 1920, as well as official American diplomatic recognition of the Soviet government.¹¹

The Senate did not ratify the Agreement—rather, it was “simply [] an exchange of diplomatic correspondence.”¹² This is not surprising, given the “continued . . . opposition” in Congress to recognizing the Soviet government and an entrenched policy established in 1917 during the Wilson Administration by then-

⁹ See Chandler P. Anderson, *Recognition of Russia*, 28 Am. J. Int’l L. 90, 95 (1934) (quoting an October 10, 1933 letter from Roosevelt to Kalinin). See also *id.* at 90–95 (discussing a thaw in relations in the late 1920s).

¹⁰ That is, the Soviet government pledged to release claims of the previous government against Americans and pledged to decline to enforce any claims the previous government *might have* had against Americans.

¹¹ The full text of the agreement is available in 28 Am. J. Int’l L. 1, 1–11 (Supp. 1934). See also White, 85 Va. L. Rev. at 97 (cited in note 5) (claiming these Soviet concessions were “significant”).

¹² White, 85 Va. L. Rev. at 113 (cited in note 5). See also U.S. Const. Art. II, § 2, cl. 2 (requiring the “Advice and Consent” of the Senate to “make Treaties”); Curtis A. Bradley and Jack L. Goldsmith, *Foreign Relations Law* 367–91 (Wolters Kluwer 5th Ed. 2014) (discussing the different types of executive agreements, including the “sole executive agreement” signed in 1933); Note, *Executive Agreements and the Treaty Power*, 42 Colum. L. Rev. 831, 836–37 (1942) (noting that judicial authority for the agreements’ validity was “meagre [sp]”).

Secretary of State Bainbridge Colby to refuse the “Bolshevik regime in Russia.”¹³ That said, President Roosevelt *did* have constitutional authority to conclude the agreement, as the Supreme Court subsequently upheld in both *United States v. Belmont* and *United States v. Pink*. Thus, given external political pressure and opposition, it was arguably solely as a result of President Roosevelt’s personal determination to conclude an agreement with the Soviets that the Litvinov Agreement was signed.

B. Algiers Accords

The events surrounding the Algiers Accords have all the elements of a Hollywood blockbuster—diplomatic hostages, held in the wake of a foreign revolution, a failed rescue attempt by the American military, and fever-pitched political intrigue in the United States.¹⁴ These much more exciting circumstances begot a much more technical agreement between the United States and Iran.

The Accords consisted of two Declarations¹⁵—the first (commonly known as the “General Declaration”), provided for the release of American hostages in exchange for the United States’ transfer of Iranian assets frozen in the United States. The second Declaration (commonly known as the “Claims Settlement Agreement”) established the Iran-United States Claims Tribunal, which was

¹³ *The Soviet Union: The Question of Recognition*, in E.C. Buehler, B.W. Maxwell, and R.R. Pflaum, eds., *Selected Articles on Recognition of Soviet Russia* 238, 239–40 (1931); White, 85 Va. L. Rev. at 77, 97 (cited in note XX).

¹⁴ Indeed, this course of events *was* the subject of a Hollywood blockbuster. *See* *Argo* (Warner Bros. Pictures, 2012).

¹⁵ The Declarations themselves were issued by the government of the Democratic and Popular Republic of Algeria on January 19, 1981. The Algerian government brokered the talks in Algiers—thus the name.

afforded exclusive jurisdiction over “claims of nationals in the United States against Iran and claims of nationals of Iran against the United States,” including related counterclaims, arising out of “debts, contracts, . . . expropriations or other measures affecting property rights,” as well as over official claims of the United States and Iran against each other “arising out of contractual arrangements between them for the purchase and sale of goods and services.”¹⁶

Contrasting with the Litvinov Agreement, the Accords were borne out of political expediency. From 1941–1979, the United States was a supporter of the “Shah” of Iran (that is, Mohammad Reza Shah Pahlavi), whose reign ended with a revolution and his abdication. After the revolution, American interests were subject to widespread nationalization, expropriation, intervention, and termination of contractual arrangements. The situation escalated, however, when President Carter admitted the Shah to the United States for cancer treatment—in response, roughly 3,000 Iranian students swarmed the U.S. Embassy in Tehran and took 63 Americans hostage.¹⁷ The American reaction was swift and market driven: over \$12 billion in Iranian assets and claims in the United States were frozen—both private-

¹⁶ Algiers Accords, Art. II, § 1; Art. II, § 2. For a broad overview of the Accords, see Monroe Leigh, *Jurisdiction—Corporate Nationality*, 77 Am. J. Int’l L. 642, 642 n. a1 (1983). For a discussion of the Claims Tribunal’s jurisdiction and its initial constitutive elements, see Charles N. Brower and Jason D. Brueschke, *The Iran-United States Claims Tribunal* 26–124 (Martinus Nijhoff 1998); David D. Caron and John R. Cook, *Getting Started*, in David D. Caron and John R. Cook, eds., *The Iran-United States Claims Tribunal and the Process of International Claims Resolution: A Study by the Panel on State Responsibility of the American Society of International Law* 11–18 (Transnational Publishers 2000).

¹⁷ See Philip F. Napoli, *A Historical Overview*, in Andreas F. Lowenfeld, Lawrence W. Newman, and John M. Walker, Jr., eds., *Revolutionary Days: The Iran Hostage Crisis and the Hague Claims Tribunal—A Look Back* 5–7 (Juris Publishing 1999).

and government-owned property—a freeze whose scope was “unprecedented.”¹⁸ The American hostages were held for 444 days, released with the Accords’ signature in 1981.

As with the Litvinov Agreement, the Algiers Accords were a sole executive agreement—they were not blessed by Congress.¹⁹ President Carter’s actions to freeze Iranian claims were rooted in express statutory authorization,²⁰ but his authority to suspend claims in American courts was less clear. Nevertheless, the Supreme Court upheld the Accords’ suspension of claims, looking to a “looser sense” of congressional acceptance of a “broad scope for executive action” to conclude such international agreements.²¹

Thus, political expediency and a “general tenor” of Congressional acceptance led to resolving billions of dollars in claims and establishing an independent tribunal of unprecedented scope—furnishing hope and a potential model for negotiations with Cuba.

¹⁸ Richard J. Davis, *The Decision to Freeze Iranian Assets*, in Lowenfeld, Newman, and Walker, *Revolutionary Days* 11 (discussing the long history of complex banking and commercial relations between the two countries that made the freeze unlike prior similar actions against Cuba, North Korea, and China). *See also id.* at 19 (discussing the “*sub rosa*, economic mini-war,” in which Iranians attempted to wage a boycott of the dollar, while the United States encouraged other countries to deny Iran the use of non-dollar facilities); *id.* at 20–21 (claiming the State Department was fairly uncertain about the scope of the asset seizure until late-January 1981).

¹⁹ *See supra* note 9 [XX].

²⁰ *See Dames & Moore*, 453 U.S. at 669–70 (approvingly citing the International Emergency Economic Powers Act (IEEPA) § 203, 50 U.S.C. § 1702(a)(1)).

²¹ The Supreme Court in *Dames & Moore* found neither the IEEPA nor the Hostage Act, 22 U.S.C. § 1732 afforded the President express statutory authority to suspend foreign claims in American courts, but together, they informed a “general tenor of Congress’ legislation in [the] area,” such that the President was acting with “the acceptance of” Congress. *Id.* at 677–78.

II. Modern Claims-Settlement Regimes

The Foreign Claims Settlement Commission (FCSC), established in 1954, is a “quasi-judicial, independent agency” within the U.S. Department of Justice and adjudicates the claims of U.S. nationals against foreign citizens.²² The FCSC has jurisdiction to settle claims when Congress so delegates, pursuant to an international agreement, or at the request of the Secretary of State; and funds for FCSC awards are taken from congressional appropriations, international claims settlements, or the Department of Justice’s or Treasury’s liquidation of foreign assets in the United States.

The FCSC and its precursor agencies have resolved 43 claims programs against various countries, totaling more than 660,000 claims and awards in the billions of dollars.²³ Currently, the Commission has three active programs under agreements signed with Albania, Libya, and Iraq. Each is considered in turn as an example of current government practice that may be analogized to Cuba.

²² See Anuj C. Desai and Sylvia M. Becker, Foreign Claims Settlement Commission of the United States: 2013 Annual Report at *1–3, available at <http://www.justice.gov/sites/default/files/fcsc/docs/annrep13.pdf> (last visited April 17, 2015) (noting the FCSC assumed the functions of two prior agencies—the War Claims Commission and the International Claims Commission). See also International Claims Settlement Act, 22 U.S.C. § 1621 *et seq.*; War Claims Act, 50 U.S.C. App. 2001–2017.

²³ See, e.g., Foreign Claims Settlement Commission of the U.S.: Completed Programs <http://www.justice.gov/fcsc/completed-programs> (last visited April 17, 2015) (listing 16 recently completed programs).

A. Albania

The agreement with Albania was signed on March 10, 1995,²⁴ settling claims between citizens of the United States and Albania levied against the respective foreign governments, arising out of military action taken at the end of World War II.²⁵ Albania agreed to pay the United States \$2 million, to be distributed by the FCSC, while the United States released gold due to Albania under reparations agreements concluding World War II.²⁶

The Albanian agreement provides evidence that even ossified legal positions—here, claims that were nearly 50 years old—are not immune from resolution under an international agreement.

B. Libya

Congress unanimously passed the Libyan Claims Resolution Act,²⁷ creating a \$1.8 billion victim compensation fund for claims arising out of terrorist incidents in the 1980s blamed on Libya (though for which Libya did not accept responsibility), as

²⁴ For a text of the agreement, see Ronald J. Bettauer, *Albania-United States: Agreement on the Settlement of Certain Outstanding Claims and Financial Issues*, 34 Int'l Legal Materials 595, 597–99 (1995). See also Exec. Order No. 13,477, 74 Fed. Reg. 65965 (Oct. 31, 2008) (ordering settlement of claims); Claims Settlement Agreement between the United States of America and the Great Socialist People's Libyan Arab Jamahirirya, available at <http://www.state.gov/documents/organization/109771.pdf> (last visited April 17, 2015).

²⁵ U.S. citizen claims were largely based on expropriation and other loss of property to the Communist regime that seized power in Albania at the end of World War II.

²⁶ See Bettauer, 34 Int'l Legal Materials at 595. See also Sally J. Cummins, *Digest of the United States Practice in International Law* 502–03 (Oxford University Press 2008).

²⁷ A Bill to Resolve Pending Claims Against Libya by United States Nationals, and for Other Purposes, Pub. L. No. 110-301 (Aug. 4, 2008).

well as compensation for Libyan victims of U.S. airstrikes in Tripoli and Benghazi in the 1980s.²⁸

As opposed to all other settlement agreements discussed above, the Libya claims settlement involved only tort claims—no contractual claims. Additionally, Congress and the President acted in perfect harmony—there was not a partisan element to the agreement. As such, the Libyan settlement is not likely to prove a useful analogy for Cuba.

C. Iraq

Similar to Libya, the Claims Settlement Agreement with Iraq was entered into to resolve tort claims of U.S. citizens and their families against Iraq for hostage taking and other injuries in violation of international law.²⁹ Unlike the Libya agreement, however, the Iraq agreement was signed under the broad authority granted to the Secretary of State per the International Claims Settlement Act, 22 U.S.C. § 1623(a)(1)(C), rather than an explicit grant from Congress. Indeed, there was no sharp statement from Congress, and despite “disbelief and anger” from the

²⁸ For a description of the claims settlement, see Libya pays \$1.5 billion to settle terrorism claims (CNN, Nov. 21, 2008), available at <http://www.cnn.com/2008/WORLD/africa/10/31/libya.payment/index.html?iref=topnews> (last visited April 17, 2015). See also Royce C. Lamberth, *The Role of Courts in Foreign Affairs*, in John Norton Moore, ed., *Foreign Affairs Litigation in United States Courts* 10–12 (Martinus Nijhoff 2013).

²⁹ These claims are based in injuries from the First Gulf War, when hundreds of American soldiers were used as human shields. See Agreement between the United States of America and Iraq, available at <http://www.state.gov/documents/organization/191781.pdf> (last visited April 17, 2015); Letter from Mary E. McLeod to the Honorable Anuj C. Desai and Sylvia M. Becker (Oct. 7, 2014), available at http://www.justice.gov/sites/default/files/pages/attachments/2014/10/21/iraq_claims_second_referral_10-7-2014.pdf (last visited April 17, 2015) (referring the claims to the FCSC and explaining the State Department’s categorization of pending claims).

Iraqi people,³⁰ the Iraqi claims settlement has proceeded without significant controversy.

Thus, the Iraqi agreement, similar to the Libya agreement, does not appear to be a useful analogy to a prospective Cuban settlement.

III. The Cuban Dilemma

Settling the thousands of American claims against the Cuban government is not likely to happen soon, but it is (currently) a statutory requirement before the embargo may be lifted.³¹ This Part discusses the primary barriers to reaching an agreement, including threshold issues, the main hurdles for the United States (political and statutory), the primary points of contention, and whether prior agreements furnish hope for a successful agreement with Cuba.

A. Threshold Issues

At this writing, U.S.-Cuba relations are constantly evolving, lurching toward full normalization of relations. In late March 2015, Chief of the Political Section for the U.S. Interest Section in Cuba, Justin Davis, claimed that the current focus of negotiations would be removing Cuba from the United States' list of State Sponsors of Terrorism.³² In mid-April, however, President Obama announced that he intends

³⁰ Nizar Latif and Phil Sands, *Iraqis Outraged at Payout for US Victims of Saddam* (Middle East Online, Sept. 15, 2010), available at <http://www.middle-east-online.com/english/?id=41341> (last visited April 17, 2015).

³¹ See 22 U.S.C. § 6067(d). As will be discussed, this statutory requirement may be unconstitutional as an impermissible restriction on the Executive's power to recognize foreign countries.

³² See U.S. Department of State: State Sponsors of Terrorism, available at <http://www.state.gov/j/ct/list/c14151.htm> (last visited April 17, 2015).

to remove Cuba from this list.³³ Of course, this presidential designation is not the end of the story—a joint resolution from the House and Senate could block the removal. Regardless, President Obama’s announcement is an indication that U.S.-Cuba relations continue to evolve quickly.

After removing it from the State Sponsors of Terrorism, the United States would require establishing a full diplomatic embassy in Cuba, as opposed to the current “Interest Section.” Though the interest section operates as a “de facto embassy,” normalizing relations would assuredly require the establishment of a full embassy. Again, however, this is likely to occur in the near future—Roberta Jacobson, U.S. Assistant Secretary of State for Western Hemisphere Affairs recently said embassies in each country could be open as early as mid-April.³⁴

B. Hurdles for the United States

The most significant hurdles to a successful claims settlement agreement are political and statutory. Politically, congressional Republicans have vocally opposed any normalization of relations with Cuba—Senator Marco Rubio has characterized President Obama’s Cuba relations as a “concession to tyranny”; Senator Ted Cruz claimed President Obama has “made [relations] worse”; and Speaker of the House

³³ Randal C. Archibold and Julie Hirschfeld Davis, *Cuba to Be Removed from U.S. List of Nations that Sponsor Terrorism* (N.Y. Times, Apr. 14, 2015), available at http://www.nytimes.com/2015/04/15/world/americas/obama-cuba-remove-from-state-terror-list.html?_r=0 (last visited Apr. 17, 2015) (noting that Cuba’s place on the list has recently emerged as a “sticking point in negotiations” to normalize relations).

³⁴ Serena Marshall and Jim Avila, *Cuba and US a Step Closer to Reopening Embassies* (ABC News, Feb. 27, 2015), available at <http://abcnews.go.com/International/cuba-us-step-closer-reopening-embassies/story?id=29285150> (last visited Apr. 17, 2015).

John Boehner criticized the turn of relations as deeply “misguided.”³⁵ Indeed, Republicans have pledged to deny funds to reopen the embassy in Havana, stall the nomination of an ambassador, and “ignore” White House requests to lift the embargo.³⁶

Statutory obstacles are even more ominous.³⁷ Before allowing a normalization of relations, the Helms-Burton Act³⁸ requires the President to determine, *inter alia*, that the Cuban government is democratically elected under “free and fair” elections, the government shows “respect for the basic civil liberties and human rights” of Cuban citizens, the government is “substantially moving toward a market-oriented economic system based on the right to own and enjoy property,” and the government has made “demonstrable progress” to establishing an independent judiciary.”³⁹ Though the President could, ostensibly, act by executive action in affirming these requirements, it would certainly not be in good faith, as Political Section Chief Justin Davis noted in an interview. On the other hand, Congress could *amend*

³⁵ Sean Sullivan and Ed O’Keefe, *GOP Lawmakers Blast Obama’s Cuba Policy Shift* (Washington Post, Dec. 17, 2014), available at <http://www.washingtonpost.com/blogs/post-politics/wp/2014/12/17/cuba-deal-reaction-sharply-split-on-capitol-hill/> (last visited Apr. 17, 2015).

³⁶ Lauren French, *How Republicans Could Stop Obama’s Cuba Play* (Politico, Dec. 18, 2014), available at <http://www.politico.com/story/2014/12/congress-cuba-reaction-113654.html> (last visited Apr. 17, 2015). *But see* Deb Riechmann, *Despite Pushback from Lawmakers, There’s Little Chance Congress can Stop Cuba Policy* (PBS Newshour, Dec. 18, 2014), available at <http://www.pbs.org/newshour/rundown/despite-pushback-lawmakers-theres-little-chance-congress-can-stop-cuba-policy/> (last visited Apr. 17, 2015).

³⁷ *Cf.* Litvinov Agreement, which was concluded without *any* statutory restriction.

³⁸ 22 U.S.C. §§ 6021–6091.

³⁹ 22 U.S.C. § 6066. *See also* 22 U.S.C. §§ 6063, 6065. *But see* Peter Schroeder, *Can Obama Lift Cuba Embargo Alone?* (The Hill, Dec. 17, 2014), available at <http://thehill.com/policy/finance/227442-can-obama-lift-cuba-embargo-without-congress> (last visited Apr. 17, 2015) (noting a litany of actions that President Obama may take without congressional approval to “chip away” at the embargo).

Helms-Burton to remove these statutory requirements. Indeed, Republican Senator Jeff Flake purportedly supports such an action.⁴⁰

C. Primary Points of Contention

Any claims settlement with Cuba will inevitably involve competing valuations of two aggregate values: American citizens' claims against the Cuban government for expropriated property and Cuban claims for damage to the Cuban economy as a result of the United States' economic embargo. Indeed, Former Cuban Supreme Court Justice, Elpidio Pérez Suàres calls this "one of our most complicated problems." This is further complicated by the fact that in the late 1950s, Cuba attempted to pay to settle claims with an increased sugar quota, but President Eisenhower cut the sugar quota, in a first step toward what would become a full embargo.⁴¹ For Cuba, this action represented an arbitrary decision by the United States that Cuba could not pay to settle American claims, and was effectively an American decision to walk away from the bargaining table, when Cuba was ready and willing to resolve the countries' disputes.⁴² Thus, from a Cuban perspective, the United States would need to explain its prior malcontent to overcome Cuban skepticism.

⁴⁰ See Letter from Senators Jeff Flake and Paul Ryan to President Barack Obama (Jan. 28, 2015), available at http://www.flake.senate.gov/public/_cache/files/7b4ccf5c-54eb-4e20-a2b1-9b9f27cfe90f/01.28.2015-flake-paul-gop-coalition-letter-on-us-cuba-reform.pdf (last visited Apr. 17, 2015).

⁴¹ Proclamation No. 3355, 74 Stat. C72 (1960).

⁴² In separate personal interviews, Vladimir Falcón, representative for the Cuban Institute for Friendship with the Peoples (ICAP), and Former Justice Suàres independently confirmed this finding.

Next, the baseline value of claims is complicated by multiple developments. First, as Former Justice Suàres noted, several claims against Cuba have already been presented to an American tribunal, with a judgment executed against Cuba—despite the fact that Cuba denies that any American tribunal would have jurisdiction to hear the claim. These judgments, which Cuba considers void as a threshold issue, would need to be offset or reclaimed in order to pursue any comprehensive claims-settlement program. Second, as Representative Falcón explained, there is the issue of Cubans whose property was seized by the Castro government during the Revolution, who did not initially come to the United States but have emigrated sometime after 1960. Would their claims be included in the prospective agreement?⁴³ Suàres calls these “calcification problems” that have arisen from the embargo’s extended duration.

The next “sticking point” is the fact that the Cuban government views the American embargo as a violation of international law, and losses to the Cuban economy as a result of the embargo must be compensated.⁴⁴ This could be a substantial sum, but even the Cuban government cannot decide how to calculate the extent of damages. Vice Foreign Minister Abelardo Moreno claims that at current prices, a conservative estimate of economic damages would be in excess of

⁴³ Former Justice Suàres posed a similar hypothetical, highlighting the case of Castillo Rum and its claims against the Cuban government. The owner and daughter of the company are Cuban, the family’s rum factory was nationalized, but the father has since passed away, never having emigrated to the United States. His daughter, however, has. Does the daughter inherit the father’s claim, now that she is present in the United States?

⁴⁴ Representative Falcón, of ICAP, for one, takes this view. *See also generally* Nigel D. White, *The Cuban Embargo under International Law: El Bloqueo* (Routledge 2014) (viewing the American embargo of Cuba as a “serious violation” of international law, and further claiming that the embargo undermines the use of sanctions around the world).

\$104 billion, but if one considers the devaluation of the U.S. dollar against the price of gold on international financial markets, damages reach nearly \$1 trillion.⁴⁵ This is a *substantial* discrepancy that will require resolution to come to a final agreement.

D. Hope? Comparing to Other Settlement Agreements

U.S.-Cuba relations have many features of prior agreements that suggest the parties will be able to reach a claims-settlement agreement, but there are also features that caution skepticism. This Section first examines aspects that favor an expeditious settlement, and then it examines aspects that disfavor an expeditious settlement.

1. Favoring Settlement

Executive Support. Clearly, the most ardent supporter of a Cuban settlement is President Obama. Just as President Roosevelt substantially expedited the Litvinov Agreement with the Soviet Union, President Obama's initiative to change relations with Cuba will certainly expedite a claims-settlement agreement.

Ossified Relations. At first blush, decades of frozen relations with Cuba would suggest negotiating a claims-settlement agreement would prove impossible.

⁴⁵ Portia Siegelbaum, *Cuba: U.S. Embargo Causes \$1 Trillion in Losses* (CBS News Sept. 14, 2011), available at <http://www.cbsnews.com/news/cuba-us-embargo-causes-1-trillion-in-losses/> (last visited Apr. 18, 2015). For a more recent estimate, see Daniel Trotta, *Cuba Estimates Total Damage of U.S. Embargo at \$116.8 Billion* (Reuters, Sept. 9, 2014), available at <http://www.reuters.com/article/2014/09/09/us-cuba-usa-idUSKBN0H422Y20140909> (last visited Apr. 18, 2015) (claiming damage to Cuba's foreign trade at \$3.9 billion from April 2013 to June 2014 *alone*).

Fortunately, history has not borne this out. The agreement with Albania was concluded after over fifty years, for one.⁴⁶

Negotiating with a Politically Averse Country. Dissenters to resetting relations with Cuba have disclaimed negotiating with a Communist state. Certainly, this would not be the first instance in which the United States has concluded an agreement with a country with politically averse interests. Both the Litvinov Agreement and the Algiers Accords were signed with regimes that were much more adverse to the United States' interests than is Cuba. Similarly, the agreement with Albania required negotiating with a Communist government.

Presence of Hostages. President Obama's December 2014 announcement was directly preceded with a hostage exchange between the United States and Cuba. Likewise, the Algiers Accords were expedited on account of American hostages in Tehran. The fact that hostages are no longer part of the equation with Cuba may work against an expeditious settlement, but that the United States has already concluded such a high-stakes agreement with Cuba provides evidence that further diplomatic agreements are foreseeable.

2. *Disfavoring Settlement*

Statutory Obstacles. No prior claims-settlement agreement has involved statutory restrictions—much less restrictions as stringent as those in the Helms-Burton Act. Further, no other negotiation would have *required* congressional authorization of any sort. To be sure, the most significant agreements discussed

⁴⁶ Additionally, the agreement with the Soviet Union was concluded after over a decade of tense relations, during politically hostile times, when it was far from clear that the Communists would be recognized by the United States.

above—the Litvinov Agreement and the Algiers Accords—were *sole executive* agreements. That is, Congress was entirely uninvolved with the negotiation process. As alluded to above, these statutory obstacles and requirement for congressional approval will likely prove to be the most substantial obstacle to a claims agreement with Cuba.

Strong Political Lobby. A majority of congressional Republicans have vocally opposed any change in relations with Cuba, much less finalizing an claims-settlement agreement with the country. This political opposition could prove fatal to success in reaching any agreement. Just as any ordinary statutory agreement may founder in Congress, any claims-agreement with Cuba must pass through Congress' veto gates. The presence of a strong political lobby is also likely to cause a Cuban claims-settlement agreement to flounder, as congressional Republicans may erect numerous procedural gates to ever even voting on an agreement.

Political Expediency (or Lack Thereof). One factor that suggests a claims-settlement agreement is far from expected is the lack of political expediency. As opposed to both the Litvinov Agreement and the Algiers Accords, the United States is not due to realize a substantial benefit from a claims-settlement agreement with Cuba. That is, there are no hostages to be released, and creditors with claims against the Cuban government are hardly clamoring for immediate relief. Indeed, there is a sizeable contingent of Cuban-Americans concentrated in Florida that are staunchly opposed to normalizing relations with Cuba, including resolving claims.

Conclusion

Historical precedent provides a wealth of examples of instances in which the United States has successfully concluded a large-scale claims-settlement agreement with a foreign government. Of course, relations with Cuba are unique in many ways—not to mention the statutory framework and restrictions imposed by the Helms-Burton Act. Regardless, certain aspects of this agreement that may otherwise suggest an agreement would be impossible have actually been encountered—and successfully overcome—in past negotiations.